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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-688

L Q MOTOR INNS, INC., SAMUEL E. BARSHOP, PHILIP M. BARSHOP, DORIS BARSHOP SPECTOR AND NORMAN S. DAVIS,

Petitioners,

versus

BERNARD D. SPECTOR,

Respondent.

On a Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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OPINIONS BELOW

The opinion of the Court of Appeals entered August 8, 1975 is reported at 517 F.2d 278 (Petitioners' Appendix A). The memorandum opinion of the District Court entered May 7, 1974 is unreported (Petitioners' Appendix B).

JURISDICTION

The jurisdictional requisites are adequately set forth in the Petition.

NATURE OF CASE

This litigation is concerned with a fraudulently induced sale of securities, which Respondent owned free and clear under a Texas divorce judgment. Respondent Bernard D. Spector alleges that Petitioners fraudulently induced him to sell 18 shares of stock in Barshop Motel Enterprises, Inc. ("B.M.E.") while wilfully concealing material facts as to an imminent public offering of such stock.

Without citing a single precedent, the District Court dismissed on the grounds that it had "no jurisdiction over the alleged cause of action." The Fifth Circuit reversed and remanded the cause for further proceedings, holding that the Respondent must be given a chance to prove his claim made under SEC Rule 10b-5, and that the trial court had jurisdiction to determine the jurisdictional and substantive issues.

QUESTION PRESENTED

This case presents but one issue not set forth in the Petition for Certiorari. That issue is:

> Whether in view of the verified amended complaint, affidavits, and documents presented, the Court of Appeals correctly held that Re-

spondent had not made a "wholly insubstantial and frivolous claim" under Section 10(b) of the Securities Exchange Act and SEC Rule 10b-5, the decision of which requires further proceedings on the merits so as to resolve factual disputes and to insure a proper determination of any jurisdictional issues.

This issue was discussed by the Court of Appeals in its opinion, and the controlling precedents clearly noted.

STATUTES AND RULES INVOLVED

The statutes and rules involved are set forth in Annex G, *infra*, beginning at page 43a. They include the following:

United States Constitution,
Article III, Section 2

Securities Exchange Act,
15 U.S.C. §§ 78c, 78j, 78aa

Exchange Act Rule 10b-5,
17 C.F.R. § 240.10b-5

Federal Rules of Civil Procedure,
Rules 8, 12 and 56

COUNTER-STATEMENT OF THE CASE

The facts of the case are stated in detail in the decision of the Court of Appeals (Petitioners' Appendix A).

As the Fifth Circuit observed, a final judicial determination of this controversy admittedly requires the resolution of a number of "factual questions" (517 F.2d at 282, 284).

Many of the statements and conclusions contained in Petitioners' "Factual Background" are either incorrect or subject to material factual disputes. We will not attempt to correct each of these misstatements.

Petitioners create the misimpression that Respondent Spector never had an ownership interest in the B.M.E. stock that was sold. However, the Property Settlement Agreement and Judgment of Divorce awarded 18 shares of B.M.E. stock to Respondent as his sole and separate property, free and clear. (Annex C and D, *infra*) Further, as Chief Judge Gibson noted, there is ample evidence in the record reflecting that Respondent and his wife owned 40 shares of B.M.E. stock as community property before the divorce (517 F.2d at 284-285). In Annex B, C, D and F, *infra*, portions of certain documents supporting this contention are underlined in red.

Petitioners create the misimpression that the Judgment of Divorce and the Property Settlement Agreement approved by the divorce court required Respondent Spector to sell his stock in B.M.E. However, nothing in these documents required such a sale. (See Annex C and D, *infra)* Affidavits filed establish that the stock sale was not part of the property settlement between husband and wife, but was a sale to B.M.E., which was an entity entirely separate and distinct

from either party to the divorce (App. 271-275)[1]. B.M.E.'s purchase of Respondent's stock was a "separate transaction founded upon a written instrument . . . to be executed *only after* the final Judgment of Divorce had been entered." (App. 272; see also Annex B, *infra* at pp. 16a-21a)

Even the fee statement and opinion letter rendered by the lawyers in connection with the agreement for B.M.E.'s purchase of Respondent's stock were addressed to B.M.E., not to Respondent's ex-wife. (App. 273-274, 279-281).

In short, the record reveals a number of material "factual disputes" foreclosing dismissal of this suit prior to a trial on the merits. Annex A, *infra*, is a table giving a partial list of these factual disputes which oppose many of the statements made in the "Factual Background" of the Petition.

ARGUMENT

The three "Questions Presented" listed in the Petition are dealt with in the same order below under Points I, II, and III. None of Petitioners' three questions are presented for review; but instead such questions have been propounded in an attempt to have the Court prematurely determine spurious legal issues, premised upon false or disputed factual assumptions.

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1 The term "App." refers to the printed Appendix as filed with the Fifth Circuit. A copy of such Appendix as well as the briefs filed with the Fifth Circuit have been certified to the Court pursuant to U.S. Supreme Court Rule 21.

I

The Decision Of *United Housing Foundation v. Forman*, ___ U.S. ___, 95 S.Ct. 2051, 44 L. Ed. 2d 621 (1975) Has No Application To What Is At Issue Herein

Petitioners argue that the Fifth Circuit's opinion is in error in light of the Court's decision in *United Housing Foundation v. Forman*, ___U.S. ___, 95 S. Ct. 2051, 44 L. Ed. 2d 621 (1975). Despite the suggestion at pages 12 and 18 in the Petition to the contrary, the *United Housing Foundation* case was specifically cited to the Fifth Circuit prior to its decision on August 8, 1975. In a letter dated June 23, 1975 addressed to the Fifth Circuit, Petitioners specifically sent to Circuit Judges Gibson, Thornberry and Ainsworth copies of the *United Housing Foundation* decision. In their motion for rehearing and rehearing en banc, moreover, Petitioners unsuccessfully reurged the applicability of the *United Housing Foundation* decision.

The Fifth Circuit correctly decided that *United Housing Foundation* does not apply to our case. The holding in that case was that "so-called" shares of stock issued by a massive housing co-operative were not "securities" within the meaning of Section 2(1) of the Securities Act of 1933 [15 U.S.C. §77b(1)]. In reaching that result, the Court reasoned that the so-called "shares" were not bought in hopes of receiving profits from the efforts of others, but were bought to provide living quarters for themselves.

In our case, the stock sold by Respondent to Petitioners was in a corporation operating a chain of 33 motels so that investors such as Spector had a reasonable expectation of making profit from the efforts of others.

The rejection by the Fifth Circuit of the decision in *Kern County Land Co. v. Occidental Petroleum Corp.*, 411 U.S. 582 (1973) was also correct. That litigation pertained to a suit brought under Section 16(b) of the Securities Exchange Act that involved a situation where the transaction complained of was the execution of a stock option agreement by the owner of more than 10% of the shares in connection with a blocked tender offer. A divided Court, after reviewing the transaction complained of, held that the short swing profit prohibitions of Section 16(b) had not been violated because "The option . . . does not appear to have been an instrument with potential for speculative abuse . . ." 411 U.S. at 602. In short, there was no "sale" because there had not been any "exploitation of inside information". *Id.* at 603.

In our action, Respondent Spector alleges that there has been *fraudulent conduct and the wilful concealment of material inside information* (Annex B, *infra*). To adopt Petitioners' position would be to deprive any divorced person of the protection of "full disclosure" as afforded by the federal securities laws in selling securities obtained in divorce proceedings "free from any claim" (Annex B, at p. 16a; Annex C, at pp. 25a, 28a).

The verified allegations made in the First Amended Complaint as well as the affidavits and other evidence

in the record show an archetypal 10b-5 case involving the "purchase by one group in a closed corporation of the interest of another, without disclosing negotiations for the sale or disposition of the issuer's assets or its securities at a higher price." 1 Bromberg, *Securities Law: Fraud-SEC Rule 10b-5*, §4.2 at p. 70 (1974). In this connection, Respondent asserts:

(1) that Petitioners caused a closed corporation to purchase 18 shares of stock for $370,000.00;
(2) that Petitioners in connection with B.M.E.'s purchase of Spector's stock utilized materially false and misleading statements;
(3) that Petitioners wilfully concealed from Spector material facts about a proposed "public offering" through E. F. Hutton & Company, Inc.; and
(4) that Respondent would have refused to sell his shares of common stock, or any part thereof, for $370,000.00 if disclosures had been made as to the E. F. Hutton public offering.

Under facts substantially similar to those involved herein, the courts have uniformly held that there is jurisdiction under Section 10(b) of the Securities Exchange Act and SEC Rule 10b-5. *Rochez Bros., Inc. v. Rhoades*, 491 F.2d 402 (3rd Cir. 1974) — SEC Rule 10b-5 violated where co-owner of closed corporation in buying out other 50% owner failed to disclose his retention of a representative to find a purchaser for the entire corporation and his interview with two prospective

buyers; *Ross v. Licht*, 263 F. Supp. 395 (S.D.N.Y. 1967) — Persons who sold their stock in closed corporation for $120.00 a share were permitted to proceed under SEC Rule 10b-5 upon allegations that defendants had failed to disclose a proposed public offering of such stock for $600.00 a share; *Kardon v. National Gypsum Co.*, 69 F. Supp. 512 (E.D. Pa. 1946), subseq. opinions 73 F. Supp. 798 (E.D. Pa 1947) (on merits), 83 F. Supp. 613 (E.D. Pa 1947) (conclusions of law) — SEC Rule 10b-5 applicable where two brothers had bought securities sold by father and son for $504,000 without disclosing an agreement to sell closed corporation for $1,500,000; *Thomas v. Duralite Company*, 386 F. Supp. 698 (D. NJ 1974), liability aff'd CCH Fed. Sec. L. Rep. ¶ 95,322 [current] (3rd Cir. 1975) — SEC Rule 10b-5 violated where owner of 45 1/2% of the stock in a closely held corporation was induced to sell his stock to corporation by misrepresentations and nondisclosures about the improvement of the corporation's financial health and the possibility of a take over by a competitor; *Schine v. Schine*, 250 F. Supp. 822 (S.D. N.Y. 1966) subseq. opinion 254 F. Supp. 966 (S.D. N.Y. 1966), appeal dism'd 367 F.2d 685 (2nd Cir. 1966) — Subject matter jurisdiction upheld under SEC Rule 10b-5 where owner of 37.6% interest in family owned corporation was fraudulently induced by majority owners to sell stock at far less than actual value; *Robinson v. Difford*, 92 F. Supp. 145 (E.D. Pa 1950) — Jurisdiction upheld under SEC Rule 10b-5 where 1/3 owners of closely held corporation alleged they were fraudulently induced by misrepresentations to sell their shares to the defendant majority shareholders for substantially less than their true value. See also generally: Loss, Securities

Regulation, Vol. III at pp. 1466-1467 (1961); Vol. VI at p. 3613 (1969); 1 Bromberg, *supra* §4.2 (1970); Latty, *The Aggrieved Buyer or Seller or Holder of Securities in a closed corporation Under SEC Statutes*, 19 Law & Contemp. Prob. 505 (1953).

Chief Judge Gibson, therefore, was correct when he remarked that to label the transaction in our case a securities "sale" within the meaning of Section 3(a)(14) of the Exchange Act "requires no strained construction of that term." (517 F.2d at 285).

II

The Real Issue Is Not Whether Federal Courts Have Jurisdiction Over Divorce Property Settlements, But Whether Persons Who Sell Securities To Third Parties After The Judicial Dissolution Of Marriages Are Entitled To The Protections Of The Anti-Fraud Provisions Of SEC Rule 10b-5

In plain terms, this litigation amounts to an attempt by Respondent Spector to set aside a sale transaction wherein Petitioners realized proceeds of $1,862,294.00 directly traceable to the 18 shares of B.M.E. stock which were fraudulently acquired from him for only $370,000.00. The divorce judgment awarded Respondent these 18 shares of stock. Respondent does not request any modification of the divorce judgment.

Since we are in agreement that Federal Courts do not generally have jurisdiction over divorce matters, it is

not necessary to discuss the cases relied upon by Petitioners in support of this thesis.[2] Petitioners are in error, however, in the characterization of the Fifth Circuit's decision as permitting Respondent to "relitigate" his property settlement, thereby opening a "Pandora's box by vastly expanding the scope of the Federal Securities Law." (Petition at p. 23). Respondent obviously does not desire to set aside, relitigate, or modify so much as a single word or comma of the Property Settlement or Judgment of Divorce. In fact, Respondent Spector relies upon these very instruments as constituting an admission and judicial pronouncement that he at all relevant times was a minority shareholder of B.M.E. to whom its directors, controlling persons, officers, and successors owed fiduciary duties. See in this connection Count III of the verified First Amended Complaint, Annex B, *infra*; as well as the discussion in the Fifth Circuit's opinion at 517 F.2d 284-285, and in particular n. 11. Before the divorce, Respondent owned his community property interest in 40 shares; after the divorce, he owned 18 shares separately. (Annex C, D and F) No amount of

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2 *McCarty v. Hollis*, 120 F.2d 540 (10th Cir. 1941); *Druen v. Druen*, 247 F. Supp. 754, 755 (D. Colo. 1965); *Lutsky v. Lutsky*, 310 F. Supp. 517 (S.D. Fla. 1970); *Gargallo v. Gargallo*, 472 F.2d 1219 (6th Cir. 1973); *Shiffman v. Askew*, 359 F. Supp. 1225 (M.D. Fla. 1973), each merely follow the general rule that Federal Courts do not entertain actions involving matrimonial status or other domestic relations matters. Respondent seeks no such relief. See also: Wright, Law of Federal Courts 62, 285-286 (2d Ed. 1970). Here, of course, Respondent does not seek to attack, modify, or set aside the Property Settlement or Judgment of Divorce wherein he was awarded 18 shares of BME Stock as his sole and separate property without a requirement for a subsequent sale to anyone. This was fully discussed in Respondent's Memorandum of Law in Opposition to Motion to Dismiss for Lack of Jurisdiction. [App. pp. 227-233] Similarly *Spears v. Spears*, 162 F.2d 345 (6th Cir. 1947) cert. denied 332 U.S. 768 has no application where no construction or modification is requested of the Property Settlement or Divorce Decree.

strained rhetoric can change the simple truth that Respondent Spector is not challenging the fairness of the Property Settlement Agreement and Judgment of Divorce, wherein he was awarded 18 shares of stock "free of any claim." The Fifth Circuit's opinion is in no manner a precedent for modifying divorce judgments.

Respondent's complaint is against the officers, directors, and controlling persons of B.M.E., and its successor corporation L Q Motor Inns, Inc. It is these parties who combined and conspired and aided and abetted each other to accomplish a stock fraud involving a sum in excess of $1,000,000.00. Quite significantly, Petitioners have yet to file an answer or any affidavit from a party defendant in which a denial is contained to the verified allegations of fraudulent conduct by these parties.

III

There Is No Conflict Of Decisions As The Teaching Of *Bell v. Hood*, 327 U.S. 678 (1946) Is Applicable To Petitioners' Motion To Dismiss

The Fifth Circuit was entirely correct in its determination that for purposes of ruling upon Petitioners' motion to dismiss for lack of jurisdiction:

> Our review is limited to observing whether the complaint is drawn to seek recovery under a federal statute, and if so, determining whether as a matter of law the federal claim "clearly appears to be immaterial and made solely for

the purpose of obtaining jurisdiction or * * * is wholly insubstantial and frivolous." 517 F.2d at 281, citing *Bell v. Hood*, 327 U.S. 678, 682-683 (1946).

The motion to dismiss for lack of jurisdiction was not made on the merits, as Petitioners have now claimed again after having unsuccessfully urged this contention with the same supporting authorities before the Fifth Circuit. Quite to the contrary, Petitioners' motion to dismiss was made and heard by the District Court at the very commencement of the proceedings — without Petitioners ever having filed an answer — and without Petitioners having filed a single affidavit from a party-defendant to deny the verified allegations of fraudulent nondisclosures.[3]

There is ample precedent to the effect that under such circumstances the so-called "well pleaded complaint rule" must be followed; and the complaint is not dismissed unless the alleged claim under federal law was "so attenuated and unsubstantial as to be absolutely devoid of merit," *Newburyport Water Company v. Newburyport*, 193 U.S. 561, 579 (1904), or

3 Petitioners now argue that their motion was not designed to test the formal sufficiency of the allegations of the complaint by challenging "the truth of the jurisdictional allegations . . ." (Petition at p. 31). In the District Court Petitioners had not acknowledged the formal sufficiency of the allegations in the complaint. This is shown by the fact that Petitioners previously had filed a motion to dismiss the complaint under Rule 9(b), and 12(e), on grounds that the fraud had not been alleged with sufficient particularity (Rec. Doc. 8). On April 24, 1974 the District Court after considering said motion to dismiss stated "I'm going to overrule the motion for a more definite statement." [App. p. 459] Thus, in the District Court at the April 24th hearing Petitioners apparently were contesting the sufficiency of the complaint in both their motions to dismiss.

"frivolous," *Bell v. Hood, supra* at 683. Reference is made in this connection to the Court's decisions in: *Hart v. B. F. Keith Vaudeville Exchange*, 262 U.S. 271, 273-274 (1923); *Baker v. Carr*, 369 U.S. 186, 199 (1962); *Oneida Indian Nation of New York State v. County of Oneida, N. Y.*, 414 U.S. 661, 666-667, 676 (1974); *The Fair v. Kohler Die & Specialty*, 228 U.S. 22, 25 (1913); *Montana-Dakota Utilities Co. v. North-Western Public Service Co.*, 341 U.S. 246, 249 (1951); and generally see: Wright, Law of Federal Courts 62, 285-286 (2d Ed. 1970); 2A *Moore's Federal Practice* ¶ 8.09 (1974); 5 Wright & Miller, *Federal Practice and Procedure: Civil* § 1209 (1969).

The principle of *Bell v. Hood, supra* is fully applicable to cases brought under the Securities Exchange Act. *Dann v. Studebaker-Packard Corporation*, 288 F.2d 201, 206 (6th Cir. 1961) involved an action brought under the Securities Exchange Act wherein the defendants had moved to dismiss under Civil Rule 12(b)(1) for lack of subject matter jurisdiction. In overruling a District Court's dismissal, the Sixth Circuit commented:

> [I]t should be noted at this juncture that jurisdiction to consider the allegations of the complaint does not necessarily mean that such allegations, if established, will state a claim for the relief demanded under federal law, or, indeed, for any relief at all. In *Bell v. Hood*, 1946, 327 U.S. 678, 682, 66 S. Ct. 773, 776, 90 L. Ed. 939, the United States Supreme Court held:

> "Jurisdiction, therefore, is not defeated * * * by the possibility that the averments might fail to state a cause of action on which the petitioners could actually recover. For it is well settled that the failure to state a proper cause of action calls for a judgment on the merits and not for a dismissal for want of jurisdiction. Whether the complaint states a cause of action on which relief could be granted is a question of law and * * * must be decided after * * * the Court has assumed jurisdiction over the controversy."
>
> To say federal courts have jurisdiction of the subject matter herein, therefore, means merely that they may *consider* the merits of any federal question involved. Therefore, a dismissal at this stage on the broad ground of lack of jurisdiction of the controversy would be improper. 288 F. 2d. at 206.

Federal courts when faced with the contention that a securities transaction was not a "sale" within the meaning of Federal Securities Laws, such as was made by Petitioners in their motion to dismiss, have repeatedly followed the teaching of *Bell v. Hood, supra*. In this connection the Court is directed to the following: *Superintendent of Insurance v. Banker's Life & Casualty*, 300 F. Supp. 1083 (S.D.N.Y. 1969) aff'd 430 F.2d 355 (2nd Cir. 1970) rev'd 404 U.S. 6 (1971) — District Court dismissed because plaintiff was neither "purchaser" or "seller" of securities, the Second Circuit affirmed, and this Court reversed stating that

"this case must be remanded for a full trial"; *Hooper v. Mountain States Securities Corp.*, 282 F.2d 195, 199 (5th Cir. 1960), cert. denied 365 U.S. 814 (1961) — District Court dismissed because there was no "seller" or "purchaser", Fifth Circuit held that the well pleaded allegations must be taken as true and reversed citing *Conley v. Gibson*, 355 U.S. 41 (1957); *Coffee v. Permian Corp.*, 306 F. Supp. 1371 (N.D. Tex. 1969) rev'd 434 F.2d 383 (5th Cir. 1970) — District Court dismissed complaint because plaintiff had not participated in the "purchase" of any security, Fifth Circuit reversed because the complaint had sufficiently stated a claim under the Federal Securities laws; *A. T. Brod & Co. v. Perlow*, 375 F.2d 393, 396, 398 (2d. Cir. 1967) — District Court had dismissed for lack of subject matter jurisdiction because no fraud was alleged "usually associated with the sale or purchase of securities", Second Circuit reversed holding that it is clear that the complaint sufficiently stated a claim grounded in federal jurisdiction.

Nothing could be more misleading or incorrect than Petitioners' statement that the Fifth Circuit's decision "flatly contradicts earlier rulings of the Supreme Court and four other Courts of Appeal" (Petition at p. 24). All of Petitioners' authorities have little to do with the traditional, or "first type", Civil Rule 12(b)(1) motion, which was the motion filed in this action. We have, accordingly, consigned to the margin below our discussion of Petitioners' cases.[4]

4 *McNutt v. General Motors Acceptance Corporation*, 298 U.S. 178 (1936) involved a situation in which the plaintiff failed to allege any "facts" in his petition or introduce any evidence to support his general allegation to the effect that the amount in controversy exceeded $3000, the required jurisdictional amount. In our case, Respondent has alleged with particularity in his verified com-

Petitioners now admit that the First Amended Complaint alleges a good cause of action showing jurisdiction under the Securities Exchange Act; but then they somehow claim that when one "goes beyond the pleadings", some failure of jurisdiction is established.

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plaint the requisite jurisdictional facts. In addition Respondent fully informed Petitioners as well as the District Court that he "must be afforded full discovery to develop complete information as to the jurisdictional issues and is not required to try such issues upon affidavits". App. pp. 226-227; see also: App. pp. 460, 495-496, 506.

Gibbs v. Buck, 307 U.S. 66 (1939) involved an injunction suit brought under the copyright act. The defendants moved to dismiss because of the absence of the jurisdictional amount in that the loss of any member of the plaintiff society would not meet the jurisdictional requirements. The Court upheld the District Court's conclusion that the necessary jurisdictional facts had been adequately alleged and presented.

Local 336, American Federation of Musicians, AFL-CIO v. Bonatz, 475 F.2d 433 (3rd Cir. 1973) involved the suit brought by a musicians' union and leader against the proprietor of a cocktail lounge seeking to enforce arbitration award. The District Court *sua sponte* at a hearing upon the plaintiff's motion for a summary judgment dismissed the action upon jurisdictional grounds. The Third Circuit reversed the dismissal because the plaintiffs had not been given an adequate opportunity to establish the jurisdictional facts. In our case, Respondent similarly seeks the "right to take depositions," and to engage in further discovery to fully establish the jurisdictional facts. App. pp. 460, 226-227, 495-496, 506.

Prairie Band of Pottawatomie Tribe of Indians v. Puckkee, 321 F.2d 767 (10th Cir. 1963) was a declaratory judgment action to determine the rights of certain indians to congressionally appropriated funds. The Tenth Circuit affirmed the trial court's dismissal for lack of jurisdiction in that "this suit does not purport to invoke the construction and effect of the federal statute . . . ." In our case, the construction and effect of the Securities Exchange Act and SEC Rule 10b-5 promulgated thereunder is clearly involved. Annex B, *infra* at pp. 2a-9a.

Shahmoon Industries, Inc. v. Imperato, 338 F.2d 449 (3rd Cir. 1964) was a diversity action brought for a breach of fiduciary duty. Upon a jurisdictional point being raised for the first time in the appellate court, the Third Circuit reversed the judgment of the trial court and directed that further proceedings be held.

Spears v. Spears, 162 F.2d 345 (6th Cir. 1947) cert. denied 332 U.S. 768 is discussed in n. 2, *supra*.)

There was considerable confusion in the trial court as to whether Petitioner moved to dismiss for lack of subject matter jurisdiction under Rule 12(b)(1), or for failure to state a claim under Rule 12(b)(6), or for summary judgment under Rule 56. (App. pp. 494-497) The Fifth Circuit found that in each of these cases the motion should be denied, because of the fact issues that remain (517 F.2d at 284; Annex A, *infra*).

When one does go beyond the pleadings to look at the affidavits and other instruments, there is no way whatsoever that one can say that Respondent Spector "would *not* be entitled to recover under any state of facts which could be proved in support of his claim." 517 F.2d at 284; *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957); *Herpich v. Wallace*, 430 F.2d 792, 802 (5th Cir. 1970). Affidavits and documents establish that Respondent Spector owned the stock that was sold to B.M.E. [Annex A, B, C, D and F; App. pp. 269-279]. The Property Settlement Agreement recites that Respondent owned stock interests at all times — community property before the divorce judgment and as separate property thereafter [Annex C]. The Judgment of Divorce approved the Property Settlement Agreement and awarded the 18 shares of B.M.E. stock to Respondent [Annex D].

Not only do the pleadings allege that Respondent had stock interests to sell, but also the rest of the record in fact establishes this conclusively.

IV

It Would Be Inadvisible To Grant Certiorari In View Of The Interlocutory Nature Of The Judgment Of The Court Of Appeals

As stated in *American Construction v. Jacksonville*, 148 U.S. 372, 384 (1893):

> [T]his Court should not issue a writ of *certiorari* to review a decree of the Circuit Court of Appeals on appeal of an interlocutory order, unless it is necessary to prevent extraordinary inconvenience and embarrassment in the conduct of the cause.

This reasoning fully applies to situations where the decision of the Court of Appeals sought to be reviewed is interlocutory in nature, such as where a cause is remanded to the District Court for further proceedings on the merits. *Brotherhood of Locomotive Firemen & Enginemen v. Bangor A. R. Co.*, 389 U.S. 327, 328 (1967); *Hamilton Shoe Co. v. Wolf Brothers*, 240 U.S. 251, 257-258 (1961); Stern & Gressman, *Supreme Court Practice*, Sec. 4.19 (4th Ed. 1969). A similar rule is followed by the Court with respect to the review of the judgment or decree of the highest court of a state reversing an inferior court and remanding the case for further proceedings.

The decision of the Fifth Circuit is decidedly interlocutory in nature. The Fifth Circuit has only ruled: (i) that Respondent Spector has not made a wholly insubstantial or frivolous claim under SEC Rule 10b-5; and

(ii) that further proceedings are necessary to fully develop the facts of the controversy so as to insure a proper determination of the substantive and jurisdictional issues. In short, the case is not ripe for decision now.

Petitioners simply have not shown that this case is so exceptional, or involves legal questions of such imperative legal importance to the public, as would justify the grant of certiorari at this intermediate juncture of the litigation. The record amply reflects that Respondent has alleged facts substantially similar to those in which the Courts have uniformly held that there is a claim cognizable under Section 10(b) of the Securities Exchange Act and SEC Rule 10b-5. (See pages 8 to 10, *supra*).

In addition, the record reveals that there are material factual controversies between the parties, which among other things involve "close factual questions of intent, reliance, and motive", which bear upon the determination of the substantive and jurisdictional issues. 517 F.2d at 284; Annex A, *infra*. Faced with such fact issues, federal appellate courts have refused to affirm summary judgments previously entered on grounds that no relief was available under Section 10(b) of the Security Exchange Act. *Schoenbaum v. Firstbrook*, 405 F.2d 215, 218 (2nd Cir. 1968) (en banc) cert. denied, 395 U.S. 906 (1969); *Commercial Iron & Metal Co. v. Bache & Co., Inc.*, 478 F.2d 39, 43 (10th Cir. 1973); cf. *Azalea Meats, Inc. v. Muscat*, 386 F.2d 5, 9-10 (5th Cir. 1967).

Surely if fact issues of the type involved herein preclude summary judgment, a dismissal for want of subject matter jurisdiction made at the very commencement of the proceedings and before filing of an answer, cannot be sustained. Since the claim of Respondent Spector as alleged under SEC Rule 10b-5 is not frivolous, he should be given a chance to prove his claim (517 F.2d at 286).

CONCLUSION

For the foregoing reasons, it is respectfully submitted that this petition for a writ of certiorari should be denied.

JOHN KIRK PATTERSON
JAMES D. STEWART

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RESPONDENT

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CERTIFICATE OF SERVICE

I, JOHN KIRK PATTERSON, do certify that copies of the foregoing Respondent's Brief in Opposition have been mailed to: Tinsman & Houser, Inc., 1900 National Bank of Commerce Building, San Antonio, Texas 78205; Cox, Smith, Smith, Hale & Guenther, Inc., 500 National Bank of Commerce Building, San Antonio, Texas 78205; and Davis & O'Conner, 1500 National Bank of Commerce Building, San Antonio, Texas 78205, on this ____ day of December, 1975.

_____

JOHN KIRK PATTERSON

ANNEX A

PARTIAL LIST OF DISPUTED FACTS AND ISSUES

PETITIONERS' CONTENTIONS	RESPONDENT'S CONTENTIONS	REMARKS
1 The purchase by BME of Spector's 18 shares of its stock was not made pursuant to a transaction separate and independent and subsequent to the divorce settlement [App. p. 48.]	1 The purchase by BME of Spector's 18 shares of its stock was made pursuant to a transaction separate and apart and subsequent to the divorce settlement. [App. pp. 271-273, 76; Annex B at p. 16a, infra.]	"Indeed in no less than eight separate documents filed with the Securities and Exchange Commission . . . Defendants repeatedly state and acknowledge that the 18 shares owned by Bernard D. Spector were purchased by BME 'Following the settlement of a divorce proceeding' in March 1972.'" [App. pp. 274-275.]
2 The possibility of BME going public through a syndicate to be managed by E. F. Hutton was well known to Mr. Spector at the time BME purchased his stock. [App. p. 166.]	2 The material facts as to the proposed public offering through E. F. Hutton were willfully concealed from Spector and his attorneys. [Annex B at p. 6a, infra; App. pp. 278, 430-433, 472-473.]	See Stier v. Smith, 473 F.2d 1205, 1208 (5th Cir. 1973) ("Stated in its simplest form, when defendant fails to disclose information, the law will presume that plaintiff would have wanted to know the information if he had an inkling of its existence").
3 BME did not pay Spector the $370,000.00 based upon the value of 18 shares of its stock. [App. p. 49.]	3 BME agreed to pay Spector $370,000.00 for the 18 shares of its stock which he had been awarded in the divorce settlement as his sole and separate property. [Annex B at pp. 16a-19a, infra.]	
4 At the time of BME's purchase of its stock, Spector did not own the 18 shares free and clear. [App. p. 314.]	4 At the time of BME's purchase of its stock, Spector owned the 18 shares free and clear. [App. pp. 272-273; Annex B at pp. 16a, 19a, infra.]	
5 During the divorce settlement negotiations, Spector was never interested in receiving the 18 shares of BME stock as his separate property since the entire thrust of the divorce negotiations was to come to an agreed dollars amount. [App. pp. 168, 49, 313.]	5 During the divorce settlement negotiations, Spector claimed to have community interest in the BME shares and was willing to receive BME stock free and clear as his separate property. [App. pp. 270-271, 43, 53-54.]	See United States v. Diebold, Inc., 369 U.S. 654, 655 (1962) (Even on summary judgment motion, inferences to be drawn must be viewed in the light most favorable to party opposing motion).
6 The Stock Purchase Agreement between BME and Spector was solely a funding arrangement for the divorce, and was not a "real" transaction between BME and Spector. [App. pp. 50, 167.]	6 The Stock Purchase Agreement was a "real" transaction between BME and Spector, and said agreement was reached between Spector's attorneys and the attorneys for BME in reliance upon representations by the latter that there was "no deal" to go public. [Annex B at pp. 6a, 16a-20a; App. pp. 76, 278, 472-473, 430-433.]	See Azalea Meats, Inc. v. Muscat, 386 F.2d 5, 9-10 (5th Cir. 1967); Massey-Ferguson, Inc. v. Bent Equip. Co., 283 F.2d 12, 15 (5th Cir. 1960); Blakely v. American Employers' Insurance Co., 424 F.2d 728, 736 (5th Cir. 1970) (Actions involving fraudulent concealment or the state of mind of a person may not be decided by summary judgment).
7 Spector "never had a stock certificate evidencing such shares which was subject to his unrestricted determination as to whether he would retain or sell the BME shares nor was there any arms-length bargaining with BME . . ." [App. pp. 167-168.]	7 Spector had a stock certificate which he owned free and clear, and for which BME paid to Spector $370,000.00 in a transaction separate and distinct from and subsequent to the divorce. [App. pp. 398-399; Annex B at pp. 16a-21a; Annex F at p. 41a.]	

ANNEX B

PLAINTIFF DEMANDS TRIAL BY JURY

IN THE
UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

BERNARD D. SPECTOR,
Plaintiff,
versus CA No. SA-73-CA-285

LQ MOTOR INNS, INC.,
SAMUEL E. BARSHOP, PHILIP M. BARSHOP,
DORIS BARSHOP SPECTOR, and
NORMAN S. DAVIS,
Defendants.

FIRST AMENDED COMPLAINT

Plaintiff, Bernard D. Spector, by his attorneys, Lang, Cross, Ladon, Boldrick & Green, complaining of Defendants, alleges upon information and belief, except as to paragraphs 1 through 4, 11, 12 and 17, which are upon knowledge.

COUNT I

1. The jurisdiction of this Count I is based on § 27 of the Securities Exchange Act of 1934 (the "Exchange Act"), 15 U.S.C. § 78aa, as amended.

2. This Count I is brought under the Exchange Act, and in particular § 10(b), 15 U.S.C. § 78j, and the rules and regulations of the Securities and Exchange Commission promulgated thereunder.

3. The illegal acts complained of herein occurred in substantial part in the Western District of Texas, San Antonio Division.

4. Plaintiff is a citizen of the State of Texas, residing at 6133 Yorkshire, Dallas, Texas.

5. Defendant LQ Motor Inns, Inc. (the "Corporation") is a corporation organized and existing under the laws of the State of Delaware with its principal place of business at the Century Building, 84 N.E. Loop 410, San Antonio, Texas. The Corporation is the successor in interest to the operations of Barshop Motel Enterprises, Inc. ("Enterprises"), which predecessor organization had been founded in 1962 under the laws of the State of Texas. At present the Corporation owns and operates approximately thirty-one (31) motor inns located in Texas, Arizona, New Mexico and Louisiana.

6. Defendant Samuel E. Barshop is a citizen of the State of Texas, residing at 108 Villa Ann, San Antonio, Texas. He is President and Director of the Corporation; and presently owns approximately 22.8% of its outstanding common stock. He held similar positions with Enterprises since its inception.

7. Defendant Philip M. Barshop is a citizen of the State of Texas, residing at 105 Lou Jon, San Antonio,

Texas. He is Executive Vice President, Secretary and Director of the Corporation; and presently owns approximately 22.4% of its outstanding common stock. He was a Vice President and a Director of Enterprises since its inception.

8. Defendant Doris Barshop Spector is a citizen of the State of Texas, residing at 107 Cas-Hills, San Antonio, Texas, and is the sister of Defendants Samuel E. Barshop and Philip M. Barshop. She presently owns approximately 12.7% of the outstanding capital stock of the Corporation. She was a Director and Shareholder of Enterprises.

9. Defendant Norman S. Davis is a citizen of the State of Texas, residing at 215 Paseo Encinal, San Antonio, Texas. Mr. Davis directly and indirectly owns approximately 38,753 shares of the common stock of the Corporation. From the Corporation's inception in June, 1972 until approximately July, 1973, Mr. Davis was Secretary, General Counsel, and Director of the Corporation. He was a Secretary of Enterprises and Counsel since its inception. As is also the case of the other individual Defendants, Mr. Davis at all relevant times was a "controlling person" within the meaning of Section 20 of the Exchange Act, 15 U.S.C. § 78t.

10. Beginning approximately June, 1971 and until March 16, 1972, individual Defendants Samuel E. Barshop, Philip M. Barshop and Norman S. Davis, acting singly and in concert, had discussions and made plans as to the public sale of the securities of Enterprises and/or possible methods of public financing for Enterprises. In particular, representatives of Defen-

dants and E. F. Hutton & Company, Inc. had discussions, made plans, and took steps to effectuate an exchange offer wherein and whereby a new corporation would be formed to acquire from Enterprises all of its assets and business. Upon the consummation of the said exchange offer, there would be a public offering through E. F. Hutton & Company, Inc. of the shares of the new corporation, which public offering would also include the sale of certain shares owned by Defendants Samuel E. Barshop, Philip M. Barshop, and Doris Barshop Spector.

11. On several occasions between December, 1971 and March 16, 1972, Defendants, by their representative and attorney, Norman S. Davis, stated to Plaintiff and his attorneys that Enterprises desired to enter into a transaction whereby it would acquire from Plaintiff his eighteen (18) shares of common stock of Enterprises, said eighteen (18) shares being approximately 15% of the total then outstanding shares of Enterprises. Upon receipt of this information, Plaintiff and his attorneys on at least one occasion inquired as to the current status of any efforts by Enterprises to effectuate a public sale of its securities. In response to that inquiry, Defendants caused their agents to represent that, ". . . there is not presently in effect any contractual agreement for any such public financing, sale of securities, or merger."

12. In reliance upon the aforesaid representations and the integrity of the individual Defendants, Plaintiff on March 16, 1972, entered into a written Agreement For Purchase of BME Stock, a copy of which is made a part hereof and which is attached hereto as Exhibit "A".

13. With regard to the written agreement and transaction described in paragraph 12 wherein Plaintiff sold to Enterprises his eighteen (18) shares of its common stock, the Defendants willfully concealed from Plaintiff the material facts as to the proposed "public offering" by a syndicate to be managed by E. F. Hutton & Company, Inc. Had Defendants made such disclosures, Plaintiff would have refused to sell his common stock, or any part thereof, at the price at which it was actually sold.

14. The fraud practiced and the devise utilized by the Defendants consisted *inter alia* of the representation that:

> ". . . [T]here have been discussions with various brokerage houses in the past concerning such public sale of securities and for public financing . . . and that such discussions are continuing and are expected to continue in the future, but BME ("Enterprises") has warranted to Spector that there is not presently in effect any contractual agreement for any such public financing . . ." (Reference added)

This representation was materially false and misleading in that it omitted to state the material facts as to the proposes exchange offer and public financing through E. F. Hutton & Company, Inc. Accordingly, the Defendants failed to state material facts necessary in order to make the statements made in light of circumstances not misleading.

15. Shortly after the transaction set forth in paragraphs 12 and 13, Defendants Samuel E. Barshop,

Philip M. Barshop and Doris Barshop Spector acquired from Enterprises the said eighteen (18) shares for an aggregate of $370,000.00 which sum was paid in substantial part by their assumption of a promissory note.

16. As a part of and in furtherance of the plan which operated as a fraud and deceit upon Plaintiff, Defendants beginning approximately May, 1972 acting singly and in concert, caused the necessary papers to be prepared and filed to form the Corporation. In June, 1972, the corporate charter was granted pursuant to the laws of the State of Delaware as to the Corporation. Thereafter the Corporation acting by and through its directors, officers, and the individual Defendants as stockholders aided and abetted and participated in concert with the other Defendants in activities in furtherance of the fraudulent plan, which is more fully described above.

17. On June 29, 1972, Defendants caused a Form S-1 Registration Statement (Registration No. 2-44883) to be filed under the Securities Act of 1933, 15 U.S.C. § 77a *et seq*. Said registration statement being filed as to the public sale, by means of an exchange offer, of not less than 250,000 shares of common stock of the Corporation, at an initial public offering price of not less than $13.25 per share.

18. On March 21, 1973, the public sale of 280,000 shares of common stock of the Corporation was effectuated by a syndicate of financial underwriters represented by E. F. Hutton & Company, Inc. As selling stockholders in the public offering, individual Defendants Samuel E. Barshop, Philip M. Barshop and

Doris Barshop Spector sold in excess of 157,243 shares of common stock of the Corporation, realizing therefrom proceeds of $12.30 per share. Of the shares sold by said, individual Defendants, 151,406 shares had been acquired by them in exchange for the eighteen (18) shares of Enterprises' common stock which had been received from Plaintiff on March 16, 1972. Said individual Defendants, therefore, realized total proceeds of $1,862,294.00 for the securities which had been acquired from Plaintiff at a cost of $370,000.00 (i.e., cost of $2.44 per share). The Corporation at said public offering sold 50,000 of its shares, realizing proceeds therefrom of $615,000.00.

19. Defendants acted singly and in concert, aiding and abetting each other, in connection with the representations and matters complained of; and directly and indirectly utilized the mails and other instrumentalities in interstate commerce. Defendants' willful concealment of the aforesaid material inside information has caused Plaintiff to suffer damages in excess of $1,144,406.00.

WHEREFORE, Plaintiff demands judgment:

A. For rescission of the sale by Plaintiff to Enterprises for the sum of $370,000.00 (which amount Plaintiff hereby agrees to return to Defendants) of Plaintiff's eighteen (18) shares of Enterprises, and conversion of same into 151,406 shares of common stock of the Corporation, par value $.10 per share; and/or

B. Against Defendants, jointly and severally, for the damages suffered by Plaintiff as the result of

Defendants' aforesaid wrongful conduct, which damages exceed $1,144,406.00, plus interest; and

C. Costs and expenses of this action, including reasonable attorneys' and accounting fees; and

D. Such other and further relief as may be necessary and appropriate.

COUNT II

20. Paragraphs 3 through 19 of Count I are incorporated into this Count II by reference.

21. Jurisdiction of this Count II is based upon the principles of pendent jurisdiction.

22. This Count II is brought to enforce the liability imposed upon Defendants by Section 33 of the Texas Security Act, Vernon's Ann. Civ. St. Art. 581-33.

WHEREFORE, Plaintiff demands judgment:

A. Against Defendants, jointly and severally, for the actual damages sustained by Plaintiff as the result of Defendants' wrongful conduct, which damages exceed $1,144,406.00, plus interest; and

B. Against Defendants, jointly and severally, for punitive or exemplary damages in an amount of twice the actual damages suffered; and

C. Costs and expenses of this action, including reasonable attorneys' and accounting fees; and

D. Such other and further relief as may be necessary and appropriate.

COUNT III

23. Paragraphs 3 through 19 of Count I are incorporated into this Count III by reference.

24. Jurisdiction of this Count III is based upon principles of pendent jurisdiction.

25. The individual Defendants as representatives of all the shareholders and the managing directors of Enterprises owed fiduciary duties to each shareholder of Enterprises to deal with him fairly and impartially, and not for the sole benefit of the majority shareholders to the prejudice and detriment of a minority shareholder, such as the Plaintiff.

26. Plaintiff, on and before March 16, 1972, had no knowledge of the discussions, plans, and steps taken with representatives of E. F. Hutton & Company, Inc. as to the proposed exchange offer and public sale of Enterprises' securities. If Plaintiff had possessed knowledge of said decisions, plans, and steps taken, he would have refused to sell his stock at the price it was sold.

27. The purchase of Plaintiff's stock under the circumstances constituted the oppressive operation of corporate machinery for the sole benefit of the other shareholders to the prejudice and the detriment of the Plaintiff. Such purchase constituted a breach of the aforesaid fiduciary duties that Enterprises and the individual Defendants owed to Plaintiff.

28. On account of such breaches of duty, Plaintiff is entitled to have Defendants deliver to him 151,406 shares of common stock of the Corporation, par value $.10 per share. In the alternative, Plaintiff is entitled to his damages against Defendants, jointly and severally, in an amount in excess of $1,144,406.00.

WHEREFORE, Plaintiff demands judgment:

A. For rescission of the sale by Plaintiff to Enterprises for the sum of $370,000.00 (which amount Plaintiff hereby agrees to return to Defendants) of Plaintiff's eighteen (18) shares of Enterprises, and conversion of same in to 15,406 shares of common stock of the Corporation, par value $.10 per share; and/or

B. Against Defendants, jointly and severally, for the actual damages suffered by Plaintiff as the result of Defendants' wrongful conduct, which damages exceed $1,144,406.00, plus interest; and

C. Costs and expenses of this action, including reasonable attorneys' and accounting fees; and

D. Such other and further relief as may be necessary and appropriate.

COUNT IV

29. Paragraphs 3 through 19 of Count I, and paragraph 25 through 27 of Count III are incorporated into this Count by reference.

30. Jurisdiction of this Count IV is based upon the principles of pendent jurisdiction.

31. The representations of Defendants heretofore described under common law principles constituted a fraud committed upon Plaintiff and a fraud in the inducement of contract.

WHEREFORE, Plaintiff demands judgment:

A. For rescission of the sale by Plaintiff to Enterprises for the sum of $370,000.00 (which amount Plaintiff hereby agrees to return to Defendants) of Plaintiff's eighteen (18) shares of Enterprises, and conversion of same into 151,406 shares of common stock of the Corporation, par value $.10 per share; and/or

B. Against Defendants, jointly and severally, for the actual damages suffered by Plaintiff as the result of Defendants' wrongful conduct, which damages exceed $1,144,406.00, plus interest; and

C. Costs and expenses of this action, including reasonable attorneys' and accounting fees; and

D. Such other and further relief as may be necessary and appropriate.

COUNT V

32. Paragraphs 3 through 19 of Count I, and paragraphs 25 through 27 of Count III, are incorporated into this Count V by reference.

33. Jurisdiction of this Count V is based upon the principles of pendent jurisdiction.

34. The aforesaid acts of Defendants Samuel E. Barshop, Philip M. Barshop and Doris Barshop Spector whereby they caused Enterprises to purchase Plaintiff's shares for the purpose of appropriating to themselves the fair market value of Plaintiff's shares in excess of $370,000.00 constitute an unjust enrichment at Plaintiff's expense.

35. The amount of the excess of fair market value of Plaintiff's stock in Enterprises over $370,000.00 exceeds $1,144,406.00.

36. On account of such unjust enrichment, Plaintiff is entitled to have Defendants deliver to him 151,406 shares of common stock of the Corporation, $.10 par value. Plaintiff stands ready to refund to Defendants the purchase price of his stock. In the alternative, Plaintiff is entitled to damages against Defendants, jointly and severally, in excess of $1,144,406.00.

WHEREFORE, Plaintiff demands judgment:

A. For rescission of the sale by Plaintiff to Enterprises for the sum of $370,000.00 (which amount Plaintiff hereby agrees to return to Defendants) of Plaintiff's eighteen (18) shares of Enterprises, and conversion of same into 151,406 shares of common stock of the Corporation, par value $.10 per share; and/or

B. Against Defendants, jointly and severally, for the damages suffered by Plaintiff as the result of Defendants' wrongful conduct, which damages exceed $1,144,406.00, plus interest; and

C. Costs and expenses of this action, including reasonable attorneys' and accounting fees; and

D. Such other and further relief as may be necessary and appropriate.

San Antonio, Texas
January 24, 1974.

LANG, CROSS, LADON,
BOLDRICK & GREEN

/s/ ERNEST J. ALTGELT, III
Attorney in Charge
1540 Milam Building
San Antonio, Texas 78205
Tel: (512) 227-3106
ATTORNEYS FOR PLAINTIFF

OF COUNSEL:

ERNEST J. ALTGELT III

DEMAND FOR JURY TRIAL

A jury trial is demanded on all counts of this complaint.

/s/ ERNEST J. ALTGELT, III
ERNEST J. ALTGELT III

VERIFICATION

THE STATE OF TEXAS
COUNTY OF BEXAR

BERNARD D. SPECTOR, being duly sworn, deposes and says: that he is a plaintiff in the within action; that he has read the foregoing First Amended Complaint and knows the contents thereof; that the same is true to his own knowledge, except as to the matters therein stated to be alleged on information and belief, and that as to those matters, he believes it to be true.

/s/ BERNARD D. SPECTOR
Bernard D. Spector

SUBSCRIBED and SWORN TO before me this 24th day of January, 1974.

/s/ TOM COGHLAN
Notary Public in and for
Bexar County, Texas

First Amended Complaint

EXHIBIT "A"

AGREEMENT FOR PURCHASE OF BME STOCK

This Agreement made and entered into this the 16th day of March, 1972, by and between BERNARD D. SPECTOR (hereinafter sometimes called "Spector") and BARSHOP MOTEL ENTERPRISES, INC., a Texas corporation (hereinafter sometimes called "BME").

RECITALS

1. Spector and his wife, Doris B. Spector, have entered into a Property Settlement Agreement which has been approved by the Court and incorporated in a Divorce Decree this day entered in Cause No. F-218-805 in the 166th Judicial District Court of Bexar County, Texas, said cause being styled Doris B. Spector v. Bernard D. Spector; and under the terms of said Property Settlement Agreement and Divorce Decree Spector owns, free from any claims by Doris B. Spector, eighteen (18) shares of the Common Stock of BME (said eighteen shares BME stock hereinafter sometimes being referred to as "Spector Stock").

2. Spector has made such investigations of the financial affairs and business operations of BME and its subsidiaries as Spector considered necessary and appropriate in his independent judgment for Spector to make a determination of the present fair value of said Spector Stock. In this connection, Spector acknowledges that he is familiar with the operations of BME, its subsidiaries, and all of its assets and operations; that he assisted in the formation of the

motel operations which have come to be known as BME and participated from the inception of operations of the predecessor of BME, being Rodeway-San Antonio-Main Avenue, Inc. (hereinafter sometimes called "Main Avenue"), to October, 1969, in its tax planning and the planning of its operations; that Spector and his agents have been furnished full access to all of the books and records of BME, including all of its subsidiaries and all of the joint ventures and operations involving BME; that he has been informed of the following facts: BME has entered into and plans to enter into numerous joint ventures with individuals, partnerships, corporations and other entities for the construction and/or operation of motels and/or other real estate properties; BME is engaged in negotiating and plans to negotiate additional joint ventures with individuals, partnerships, corporations and other entities for the construction and/or operation of motels and/or other real estate properties; BME has negotiated a Joint Venture Agreement with Prudential Insurance Company and its affiliate, PIC Realty Company, for the construction, financing, and operation of motor hotels; BME has contemplated and considered, and is now contemplating and considering the possibility of substantial expansion, including the possibility of mergers into or with third parties, and possible acquisitions of other real estate and motel interests; BME and/or its principal stockholders have considered and discussed and are considering and discussing possible public sale of securities of BME and/or possible methods of public financing for BME and/or portions of its operations, and in this connection Spector has been advised that there have been discussions with various brokerage

houses in the past concerning such public sale of securities and/or public financing and/or mergers with third parties and that such discussions are continuing and are expected to continue in the future, but BME has warranted to Spector that there is not presently in effect any contractual agreement for any such public financing, sale of securities, or merger. Spector has taken into careful consideration each and all of such elements, as well as the future possibilities for expansion and improvements of BME's earnings and/or possible increase in the value of BME corporate stock, in arriving at his decision to sell said Spector Stock to BME at the price set out herein.

3. Spector has determined to his complete satisfaction that the sum of $370,000 would be a fair and reasonable price for the purchase of all of the Spector Stock from him, and Spector has offered to sell all of said Spector Stock to BME for the said $370,000 price.

AGREEMENT

NOW, THEREFORE, for and in consideration of the premises and the mutual covenants and provisions contained herein and other good and valuable consideration paid to Spector, receipt of which is hereby acknowledged, Spector and BME agree as follows:

1. *Definitions.*

1.1. *Closing.* This instrument is being executed and delivered by the parties, and the closing of the transaction herein contemplated is being closed by the parties, subsequent to the entry of the Divorce Decree in

the above mentioned Cause No. F-218,805 in the 166th Judicial District of Bexar County, Texas.

1.2. *Spector Stock*. The term "Spector Stock" refers to the eighteen (18) shares of corporate stock of BME owned by Spector and represented by Stock Certificate No. 5 of BME, a copy of which is attached hereto as Exhibit A.

2. *Sale of Stock*

Spector hereby agrees to sell to BME and BME hereby agrees to purchase from Spector eighteen (18) shares of the Common Stock of BME (said Spector Stock), being all of the Common Stock owned or claimed by Spector in BME or its subsidiaries, said stock being evidenced by said Stock Certificate No. 5 of BME.

3. *Purchase Price.*

The total consideration to be paid by BME to Spector for said Spector Stock shall be $370,000 to be paid as follows:

3.1. $70,000 shall be paid in cash by BME to Spector at the Closing of this Agreement, at which time Spector shall endorse and deliver to BME said Stock Certificate No. 5 of BME, representing all interest Spector has or claims in BME.

3.2. The remaining $300,000 shall be represented by a Promissory Note from BME payable to the order of Spector (said note to be

in the form attached hereto as Exhibit B) and delivered to Spector at the Closing. Such note will be a negotiable instrument and shall be executed by a duly authorized officer of BME. Payment of such BME Note shall be personally guaranteed by Samuel E. Barshop and Philip M. Barshop.

3.3. The Promissory Note described in Paragraph 3.2. above shall be collateralized by a pledge of said Spector Stock in the form of Collateral Pledge attached hereto as Exhibit C, which Collateral Pledge shall be duly executed and delivered by BME to Spector, at the Closing of this Agreement.

3.4 At the Closing, BME shall give Spector such evidence of corporate authority as may be required by Spector's attorneys to show (a) that the execution of said note and Collateral Pledge have been duly authorized by the directors of BME and is not prohibited by the Articles of Incorporation or By-Laws of BME, (b) that BME has retained earnings in excess of $370,000 at the time of the execution of this agreement, and (c) that upon delivery of said note to Spector the same will constitute a valid legal obligation of BME, collectible from BME in accordance with its terms.

EXECUTED IN DUPLICATE ORIGINALS the day and year first above written.

BARSHOP MOTEL
ENTERPRISES, INC.

/s/ SAMUEL E. BARSHOP
PRESIDENT

/s/ BERNARD D. SPECTOR
BERNARD D. SPECTOR

at 2:15 p.m. 3/16/72
Signing witnessed
/s/ NILES CHUBB
Vice-President
and Senior Trust Officer

APPROVED AS TO FORM:
/s/ NORMAN DAVIS
Attorney for Barshop
Motel Enterprises, Inc.

/s/ JAMES D. STEWART
Attorney for Bernard D. Spector

ANNEX C

Excerpts from Property Settlement Agreement

PROPERTY SETTLEMENT, SUPPORT, AND MAINTENANCE AGREEMENT

DORIS B. SPECTOR

versus

BERNARD D. SPECTOR

Filed: March 16, 1972

This Agreement made and entered into this the 16th day of March, 1972, by and between DORIS B. SPECTOR (the Wife) and BERNARD D. SPECTOR (the Husband), hereinafter sometimes collectively referred to as "the Parties,"

WITNESSETH:

WHEREAS, the Parties are Husband and Wife, having been married on or about the 26th day of December, 1953, in San Antonio, Bexar County, Texas; and,

WHEREAS, diverse disputes and unhappy differences have arisen between the Wife and the Husband, for which reasons they have separated and are now living separate and apart from each other and the Wife has instituted suit for divorce in the 166th Judicial District Court of Bexar County, Texas, same being styled *Doris B. Spector v. Bernard D. Spector*, and bearing Cause No. F-218, 805, said cause having

been filed on or about the 18th day of December, 1969; and wherein Husband filed an Answer and Cross Action; and,

WHEREAS, each of the Parties acknowledges and affirmatively represents that this Agreement has been reached after certain financial books and records of the various partnerships, corporations, and other entities in which Bernard D. Spector and/or Doris B. Spector have a Property Interest (as hereinafter defined) were made available (i) by Bernard D. Spector and his agents to Doris B. Spector and her agents, and (ii) by Doris B. Spector and her agents to Bernard D. Spector and his agents, for inspection by each of the Parties and their respective attorneys and accountants, and that each Party has personally made or had his or her attorneys and Certified Public Accountants in his or her employ make such investigations and analyses as he, she, or they desired of the books and records relating to the Property Interests appearing on or referred to in:

(1) the attached Exhibits A and/or D, and/or

(2) the Federal Income Tax Returns for the calendar years 1953 through 1970 of Doris B. Spector and/or Bernard D. Spector, and/or

(3) the Federal Income Tax Returns and/or Partnership Returns (Form 1065) of the business entities (corporate, partnerships, or joint ventures) relating to the Property Interests listed on the at-

tached Exhibits A and/or D, filed for each fiscal year during the period January 1, 1967 through December 31, 1970, and/or

(4) the checkbook of the Frost National Bank checking account known to the Parties as "the Doris Barshop Spector Real Estate Account," and/or

(5) "Schedule of Transactions" of Doris Barshop Spector Real Estate Account" heretofore furnished to Bernard D. Spector and his accountants, a copy of which "Schedule of Transactions" is attached hereto as Exhibit E; in this regard, Bernard D. Spector shall be bound by the transcribing of the transactions as reflected by the checks and check stubs (whether on front or back thereof), but not by any conclusions drawn therefrom by the accountant in his preparation of such Schedule;

and each Party further acknowledges that neither Party nor his or her attorneys nor any of his or her agents have refused at any time that this divorce proceeding has been pending to make available to the other Party or his or her attorneys or accountants any information, books, or records which they have requested pertaining to the financial affairs of either Party since 1953, the year in which the Parties were married; and,

* * *

Excerpts from Property Settlement Agreement

NOW, THEREFORE, FOR AND IN CONSIDERATION OF THE PREMISES and the mutual covenants and provisions herein contained and other good and valuable consideration, receipt of which is hereby acknowledged, Husband and Wife agree as follows:

1. *DISPOSITION OF COMMUNITY PROPERTY.*

1.1. The community assets and liabilities existing as of the date hereof, which were acummulated during the marriage of the Parties, consist of those Property Interests listed on Exhibit A, attached hereto, and including but not limited to those liabilities listed on Exhibit A attached hereto. The Parties hereby agree to this property settlement agreement wherein the separate property (and liabilities related thereto) of each of the Parties is to be set aside to such Party and the community property and liabilities are to be divided as herein set out, such division of the community property being an equal division between them with respect to the total value of all Community Property interests involved and such division being fair, just, and equitable.

1.2. Bernard D. Spector shall own without any claim on the part of Doris B. Spector, all community assets listed on Exhibit B, attached hereto and Bernard D. Spector shall assume and pay all community liabilities specifically listed on Exhibit B, attached hereto, and agrees to hold Doris B. Spector free and harmless of any liability therefrom.

1.3. Doris B. Spector shall own, without any claim on the part of Bernard D. Spector, all community

assets listed on Exhibit C, attached hereto, subject to any and all indebtedness thereon; and Doris B. Spector shall assume and pay all liabilities listed on Exhibit C, attached hereto, and all community liabilities not specifically assumed herein by Bernard D. Spector and agrees to hold Bernard D. Spector free and harmless of any liability therefrom.

* * *

21. *BINDING EFFECT.*

This Agreement shall be binding upon the heirs, legal representatives, and assigns of both Parties hereto.

IN WITNESS WHEREOF, the Parties have signed and acknowledged this Agreement.

/s/ DORIS B. SPECTOR
DORIS B. SPECTOR
/s/ BERNARD D. SPECTOR
BERNARD D. SPECTOR

APPROVED AS TO FORM:
/s/ A. R. SOHN
ATTORNEY FOR DORIS B. SPECTOR
/s/ JAMES D. STEWART
ATTORNEY FOR BERNARD D. SPECTOR

STATE OF TEXAS
COUNTY OF BEXAR

BEFORE ME, the undersigned authority, on this day personally appeared DORIS B. SPECTOR, known to

me to be the person whose name is subscribed to the foregoing instrument, and acknowledged to me that she executed the same for the purposes and consideration therein expressed.

GIVEN UNDER my hand and seal of office this 16th day of March, 1972.

/s/ J. RUSSELL DERG
NOTARY PUBLIC,
BEXAR COUNTY, TEXAS

STATE OF TEXAS
COUNTY OF BEXAR

BEFORE ME, the undersigned authority, on this day personally appeared BERNARD D. SPECTOR, known to me to be the person whose name is subscribed to the foregoing instrument, and acknowledged to me that he executed the same for the purposes and consideration therein expressed.

GIVEN UNDER my hand and seal of office this 16th day of March, 1972.

/s/ J. RUSSELL DERG
NOTARY PUBLIC,
BEXAR COUNTY, TEXAS

Excerpts from Property Settlement Agreement

EXHIBIT A

PROPERTY SETTLEMENT, SUPPORT AND MAINTENANCE AGREEMENT

COMMUNITY ASSETS AND LIABILITIES

ASSETS

All property interests owned by BERNARD D. SPECTOR and/or DORIS B. SPECTOR, which the parties knew of or should have known, in and to each of the following:

1. Atlantic Richfield Corporation.

2. Barshop Motel Enterprises, Inc., a Texas corporation, and all of its affiliate and subsidiary operations.

* * *

EXHIBIT B

PROPERTY SETTLEMENT, SUPPORT, AND MAINTENANCE AGREEMENT

COMMUNITY ASSETS TO BE RECEIVED BY BERNARD D. SPECTOR

1. Eighteen (18) shares of corporate stock of Barshop Motel Enterprises, Inc., a Texas corporation.

2. Note receivable from Bielstein, Lewis & Wilson with an unpaid balance of approximately $47,000.

* * *

Excerpts from Property Settlement Agreement

EXHIBIT C

PROPERTY SETTLEMENT, SUPPORT AND MAINTENANCE AGREEMENT

COMMUNITY ASSETS TO BE RECEIVED BY DORIS B. SPECTOR

1. Twenty-two (22) shares of corporate stock of Barshop Motel Enterprises, Inc., a Texas corporation.

2. Eight percent (8%) undivided interest in Empire Plaza Shopping Center, a partnership (Federal Employer Identification No. 74-1665900).

3. One Hundred and Fifty-One (151) shares of corporate stock in San Antonio Produce Terminal Market, a Texas corporation.

4. All rights, title and interest in and to the home property occupied by Doris B. Spector located at 107 Cas-Hills, in the city of San Antonio, Bexar County, Texas, and all furniture, fixtures, and other personal property located therein.

* * *

EXHIBIT D

PROPERTY SETTLEMENT, SUPPORT AND MAINTENANCE AGREEMENT

SEPARATE PROPERTY OF DORIS B. SPECTOR

Excerpts from Property Settlement Agreement

All Property Interests which the parties knew of or should have known, in and to each of the following:

1. Alamo Downs (Federal Employer Identification No. 74-6066023), a partnership which owns, among other interests, approximately 338 acres at the corner of Culebra Road and Loop 410 in San Antonio, Texas.

2. Austin Highway Enterprises, Inc., a Texas corporation.

* * *

ANNEX D

Judgment of Divorce

IN THE DISTRICT COURT
166th JUDICIAL DISTRICT
BEXAR COUNTY, TEXAS

DORIS B. SPECTOR

versus NO. F-218, 805

BERNARD D. SPECTOR

JUDGMENT

On this the 16th day of March, 1972, came on to be regularly heard the above styled and numbered cause, after the same was regularly set and called for trial, and came the Plaintiff in person and by and through her attorneys-of-record, and came the Defendant in

person and by and through his attorneys-of-record, and both parties announced ready for trial, and it appearing to the Court from an inspection of the record and from the evidence that Plaintiff's Petition has been on file in this Court for more than sixty full days and that Plaintiff is and has been an actual bona fide inhabitant of the State of Texas for a period of more than twelve months next preceding the filing of Plaintiff's Petition herein, and also has resided in Bexar County, Texas, for more than six months next preceding the filing of this suit; and the Defendant having moved in open Court that he desires to take a Non-Suit on his Cross-Action herein, which motion for Non-Suit was granted; and a jury having been waived by each of the parties hereto, the Court proceeded to try said cause, and thereupon all matters in controversy as well of fact and of law were submitted to the Court, and the Court having heard the pleadings read and the evidence and argument of counsel is of the opinion that the material facts alleged in Plaintiff's Petition have been fully proven by full and satisfactory evidence and that she is entitled to a divorce from the Defendant.

IT IS, THEREFORE, ORDERED, ADJUDGED and DECREED by the Court that the bonds of matrimony heretofore and now existing between the Plaintiff, DORIS B. SPECTOR, and the Defendant, BERNARD D. SPECTOR, be, and the same are hereby, dissolved, and the Plaintiff is hereby divorced from the Defendant.

And it further appearing to the Court that the Plaintiff and Defendant had born to them during their marriage four (4) children, to-wit: JOCELYN MARIE

SPECTOR, born August 6, 1955; JACK JOSHUA SPECTOR, born May 25, 1957; MITCHEL BARSHOP SPECTOR, born January 11, 1959; and LISA GAIL SPECTOR, born July 27, 1965, all being under the age of eighteen years; and the Court having found from the evidence that it would be to the best interests of such children that their care, custody and control be awarded to Doris B. Spector, the Plaintiff herein, with the right of Bernard D. Spector, the Defendant herein, to be and visit with such children at all reasonable times and at all reasonable places, upon first giving reasonable notice to the Plaintiff of his intention to do so; and the Court finds from the evidence that the Defendant should contribute to the Plaintiff One Hundred and Seventy-Five Dollars ($175.00) per month per child for the support and maintenance of each such child until each such child reaches his or her eighteenth birthday; that such payments are to be made directly to the Plaintiff on the first day of each month, commencing on the first day of April, 1972, and continuing on the first day of each month thereafter until each child reaches the age of eighteen years.

IT IS, THEREFORE, ORDERED, ADJUDGED and DECREED that the care, custody, and control of the four minor children above set out be and are hereby awarded to the Plaintiff, DORIS B. SPECTOR, with the right of the Defendant, BERNARD D. SPECTOR, to be and visit with such children at all reasonable times and at all reasonable places, after first giving reasonable notice of his intention to do so to the Plaintiff.

IT IS FURTHER ORDERED, ADJUDGED, and DECREED that the Defendant, BERNARD D. SPECTOR,

pay to the Plaintiff, DORIS B. SPECTOR, the sum of One Hundred and Seventy-Five Dollars ($175.00) per month per child for the support and maintenance of each of the said four children, until each such child reaches his or her eighteenth birthday, the first such payment to commence on the first day of April, 1972, and to continue on the first day of each month thereafter until each child reaches the age of eighteen years.

And it appearing to the Court that the Plaintiff and Defendant have made a settlement of their community and separate property rights in a Property Settlement Agreement entered into by the Plaintiff and the Defendant, and the Court, after having examined said Property Settlement Agreement and heard evidence thereon, finds the same to be fair, just and equitable to both the Plaintiff and the Defendant.

IT IS, THEREFORE, ORDERED, ADJUDGED, and DECREED by the Court that said Property Settlement Agreement entered into by and between the Plaintiff and the Defendant be, and the same is hereby, approved by the Court and ordered filed among the papers in this cause, and the same is made a part of this Decree as though copied herein in full, and it is further ORDERED that Plaintiff shall be permitted to withdraw said Property Settlement Agreement from the papers in this cause after the same has been so filed by signing a receipt therefor.

IT IS FURTHER ORDERED, ADJUDGED and DECREED by the Court that each of the parties shall execute and deliver to the other, on demand, such docu-

ment or documents or other instruments, as may be reasonably necessary or proper to effectuate the vesting of the title to the properties in accordance with the terms of such Property Settlement Agreement and this judgment.

IT IS FURTHER ORDERED, ADJUDGED, and DECREED by the Court that all other relief prayed for by either of the parties be, and the same is hereby, denied.

IT IS FURTHER ORDERED, ADJUDGED and DECREED by the Court that all costs of this suit herein incurred are judged to be paid one-half (½) by the Plaintiff and one-half (½) by the Defendant, for which sums let execution and such other writs as may be necessary issued: PROVIDED, HOWEVER, the Plaintiff and the Defendant shall each pay all charges relating to depositions taken by such party in conjunction with this lawsuit.

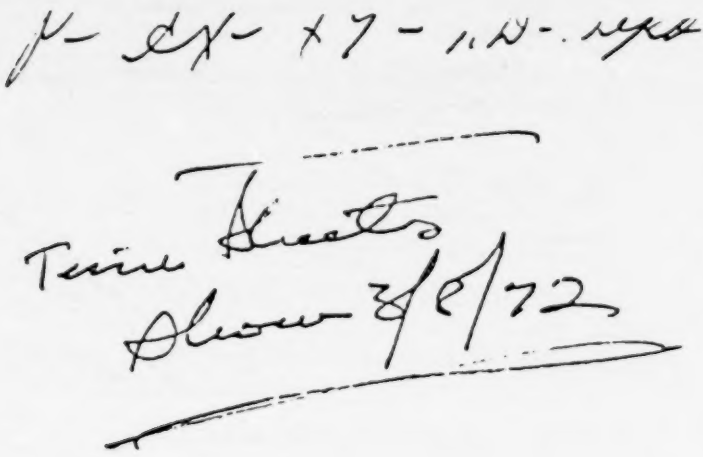
SIGNED this 16th day of March, 1972 at 1:30 P.M. APPROVED:

/s/ ROBERT R. MURRAY
JUDGE PRESIDING

/s/ A. R. SOHN
Attorney for Plaintiff
/s/ JAMES D. STEWART
Attorney for Defendant
/s/ DORIS B. SPECTOR
/s/ BERNARD D. SPECTOR
Bernard D. Spector

ANNEX E

Handwritten Notes taken by petitioner Norman S. Davis at meeting with representatives of E. F. Hutton & Company on March 8, 1972, one week before B.M.E.'s purchase of Respondent's stock (showing solid plans for going public)



3/15/72 - COME WITH 25 OF EACH ITEM

JOHN STANTON -
CHRIS ROTE -
MARK SHAPIRO -

ASSUME =
5/31 = Closing Year
8/15 = Financials Completed + File/SEC

OUT IN OCTOBER

HIT HIT HIT HIT HIT HIT HIT HIT

PROBLEMS =

1. OFFERING TO PARTNERS =
   Need prospectus to partners?
   Do we need separate "stages"?
   → How was Eulich/Rodeway handled?
   Participation by partners in expenses

2. PACKAGE TO BE OFFERED =
   Ps suggests min. play. of about 300,000 shares/Common at around $15 = total play. of $4.5 to $5 mm.
   Will [illegible] determine what funds the Corp. needs + add to that the (2) Any deals any partners want

to sell + (3) or so Sam/Phil/Doris can join us selling stuff if they want some cash.

[Sam: Enoch will probably want to sell all of his stock in the Initial Offering] =

→ Want to be sure we don't get too distracted by all of our partners holding so much stock they resume.

3. What Partner is a Cop = Does BMC get the cooperation of the Partners wants

4. Q: "Can [HUTTON] provide some kind of [the Partners] own valuation of the entire Co. as a "quasi-liquidity event" = then use that to price the subscription of services = paid value of Partners' "illiquidity" [franchise, etc.]

→ WARP: the "division" to be based on PRIVATE-TYPE valuations [e.g. 8 times Cash Flow as of Last Qtr]

5. SIMULTANEOUS CLOSING —
Plan to have partners "committed" in advance —

multiple on [low range of Public] depending on ratio of a minimum of ____ to ____ not less than 80% - 90% of X times earnings

6. FINANCIALS = PRO FORMAS NEEDED for 5 yrs. ended 5/31/72

7. Need to start on "Evaluations of Syndication w. Partners"

8. DRAFTING OF PROSPECTUS:

(1) NSD / JHP / HARRY to start
(2) Hilton to take crude indication info
(3) Dev. to add Mechanical Section

"MANAGER'S FEE" →

Assuming "8% selling discount" - Management [C.F. Hutton] would get 20% of total discount as Management =

In this case = 8% / 1.5 mil = 380,000 + 20% = 76,000 manager's fee

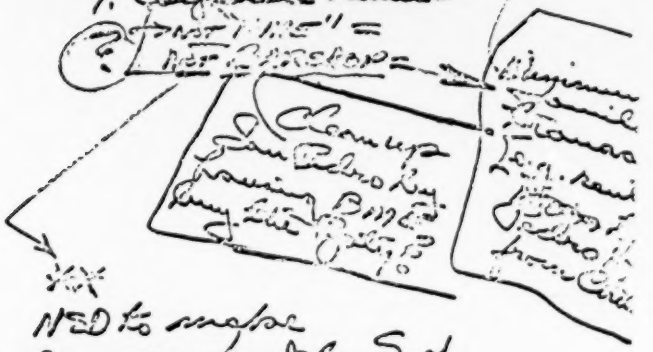
→ MARK to send us cc/5-6 late Model PROSPECTUSES =

9- PRICING =

IS = We Buy "Price" slightly below comparable seasoned public Companies =

10- FOR BEST IMAGE =

1. Good earnings =
2. Clean Transactions =
3. "Good" BOARD DIRECTORS -
4. Corporate name =



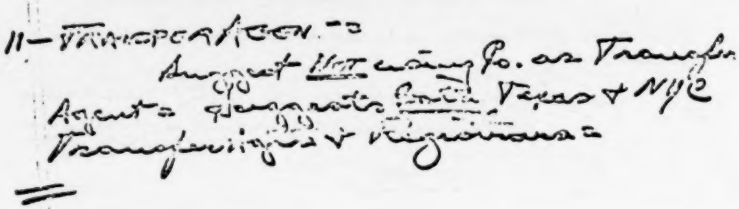
NED to make summary for John S. of "Enchanted Rock"

- HOUSTON TOWERS
- CORPUS MARINA =
- NEW LA-QUINTA =
- HOU. INTERNATIONAL AIRPORT

NED Note: Clean up + amend Rep. Charter before going Public

Handwritten Notes

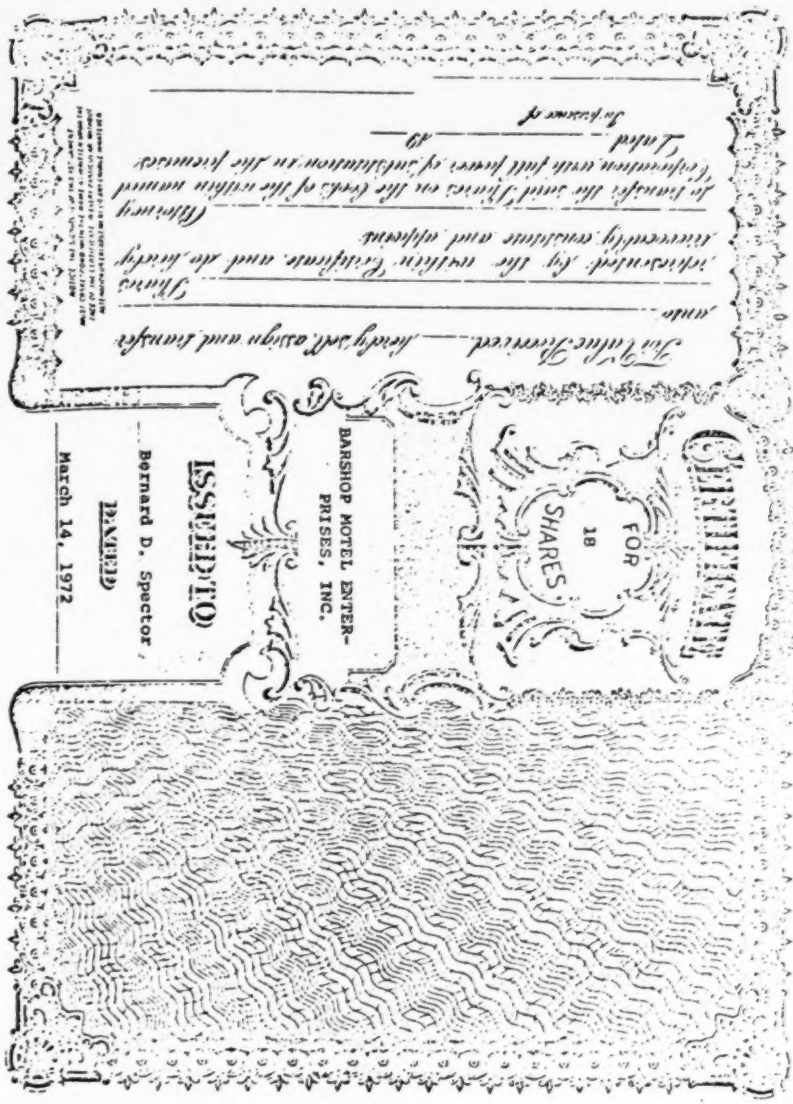
Affidavit in Reply to Opposition



ANNEX F

Stock Certificate

Stock Certificate



ANNEX G

The Constitution of the United States, Article III, Section 2, provides:

The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority; . . .

* * * *

The pertinent provisions of the Securities Exchange Act, 15 U.S.C. § 78a, *et seq.*, provide as follows:

§ 78c. *Definitions and application — Definitions*

* * * *

(13) The terms "buy" and "purchase" each include any contract to buy, purchase, or otherwise acquire.

(14) The terms "sale" and "sell" each include any contract to sell or otherwise dispose of.

* * * *

§ 78j. *Manipulative and deceptive devices*

It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce or of the mails, or of any facility of any national securities exchange —

* * * *

(b) To use or employ, in connection with the purchase or sale of any security registered on a national securities exchange or any security not so registered, any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors.

* * * *

§ 78aa. *Jurisdiction of offenses and suits*

The district courts of the United States, and the United States courts of any Territory or other place subject to the jurisdiction of the United States shall have exclusive jurisdiction of violations of this chapter or the rules and regulations thereunder, and of all suits in equity and actions at law brought to enforce any liability or duty created by this chapter or the rules and regulations thereunder. . . .

Statutes and Rules Involved

Exchange Act Rule 10b-5, 17 C.F.R. § 240.10b-5 provides:

Employment of Manipulative and Deceptive Devices

It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce, or of the mails, or of any facility of any national securities exchange,

(1) to employ any device, scheme, or artifice to defraud,

(2) to make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in light of the circumstances under which they were made, not misleading, or

(3) to engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person,

in connection with the purchase or sale of any security.

The pertinent provisions of Rule 8 of the Federal Rules of Civil Procedure provide as follows:

General Rules of Pleading

(a) *Claim for Relief.* A pleading which sets forth a claim for relief, whether an original

claim, counterclaim, cross-claim, or third-party claim, shall contain (1) a short and plain statement of the grounds upon which the court's jurisdiction depends, . . .

* * * *

(f) *Construction of Pleadings.* All pleadings shall be so construed as to do substantial justice.

The pertinent provisions of Rule 12 of the Federal Rules of Civil Procedure provide as follows:

Defenses and Objections — When and How Presented — By Pleading or Motion — Motion For Judgment on the Pleadings

* * * *

(b) *How Presented.* Every defense, in law or fact, to a claim for relief in any pleading, whether a claim, counterclaim, cross-claim, or third-party claim, shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may at the option of the pleader be made by motion: (1) lack of jurisdiction over the subject matter, . . . (6) failure to state a claim upon which relief can be granted, . . . A motion making any of these defenses shall be made before pleading if a further pleading is permitted. No defense or objection is waived by being joined

with one or more other defenses or objections in a responsive pleading or motion. If a pleading sets forth a claim for the relief to which the adverse party is not required to serve a responsive pleading, he may assert at the trial any defense in law or fact to that claim for relief. If, on a motion asserting the defense numbered (6) to dismiss for failure of the pleading to state a claim upon which relief can be granted, matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56.

* * * *

The pertinent provisions of Rule 56 of the Federal Rules of Civil Procedure are as follows:

Summary Judgment

* * * *

(b) *For Defending Party.* A party against whom a claim, counterclaim, or cross-claim is asserted or a declaratory judgment is sought may, at any time, move with or without supporting affidavits for a summary judgment in his favor as to all or any part thereof.

(c) *Motion and Proceedings Thereon.* The motion shall be served at least 10 days before the time fixed for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.

* * * *

(e) *Form of Affidavits; Further Testimony; Defense Required.* Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or further affidavits. When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him.

* * * *